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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-235

MARCO DEFUNIS, *et al.*,

Petitioners,

v.

CHARLES ODEGAARD, President of the University of Washington, *et al.*

Writ of Certiorari to The Supreme Court of the State of Washington

BRIEF FOR THE BOARD OF GOVERNORS OF RUTGERS THE STATE UNIVERSITY OF NEW JERSEY AND THE STUDENT BAR ASSOCIATION OF RUTGERS SCHOOL OF LAW AT NEWARK AS *AMICI CURIAE*

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This brief *Amicus,* in support of the position of the Respondents, is filed by the Board of Governors of Rutgers, the State University of New Jersey, and the Student Bar Association of Rutgers School of Law at Newark, with the consent of the parties as provided for in Rule 42 of the Rules of this Court.

Interest of *Amici*

The *Board of Governors* of Rutgers, The State University of New Jersey, governs the entire university system, with its many campuses and some 40,000 graduate and undergraduate students. For the past half dozen years, at least, Rutgers University has been keenly aware of an obligation to better serve the non-white[1] population of New Jersey—particularly the state's large black and Puerto Rican populations—by bringing more of its members into its student bodies to train for the business and professions and communal life in general.

Among the spurs to affirmative action by the University was the Report issued in 1968 by the New Jersey Governor's Select Commission on Civil Disorders[2] following the disturbances which swept the state's urban population centers in the summer of 1967. Examining the status of racial minorities in New Jersey, this most distinguished body, which included two former Governors of the State and a future federal appeals judge among its ten members, emphasized:

> The central issue with which this nation has temporized for the past one hundred years—to make equality real for the black man—was bound sooner or later to land on the doorsteps of each of us.[3]

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[1] The term non-white will be used throughout this brief to refer to those racial minorities which traditionally have been the targets of racial discrimination in this country. This includes not only the black population but the large Puerto Rican and Cuban populations centered on the East Coast, Chicanos in the West and American Indians concentrated in various parts of the country.

[2] Hereafter referred to as Report for Action.

[3] Id. at XI.

And in a pointed mandate to all agencies of official power in the State of New Jersey, the Commission declared:

> The burden of responsibility weighs most heavily on those in positions of power and with control over the resources that will be needed to produce tangible results.[4]

Responding to this call for action, the Rutgers Board of Governors passed a Resolution on March 14, 1969, to "establish a new and pioneering program" to "open college doors to educationally and economically disadvantaged graduates" of secondary schools in the three major urban centers of New Jersey with heavy concentrations of racial minorities—Newark, Camden and New Brunswick.

The University's Law School at Newark had recognized, even earlier, a particularly compelling need to increase the pitifully small number of indigenous lawyers available both to service the legal needs of the nonwhite population of the state[5] and to represent the nonwhite population within the legal/political system, which tends to be dominated by members of the legal profession. This recognition of the law school's obligation was prodded, among other things, by Mr. Justice Brennan's remarks at the dedication of the Law School building in the fall of 1966:

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[4] Ibid.

[5] This is not to suggest that the Law School has limited admission to its Minority Student Program to residents of New Jersey. As a national law school, Rutgers has, in all ways, served a constituency which is, in significant part, regional and even nationwide.

> [T]he law schools have experienced almost no success in attracting Negro college students to law as a career. * * *
>
> And I am sure all of us will agree that, as [has been] said, "There are reasons why a special effort should be made to attract Negro students to law study. In the effort to provide equal rights and opportunities for Negro citizens, there are heavy responsibilities and burdens for lawyers to carry. These can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community. In bringing legal counsel to the poor, in administering criminal justice, as well as in the struggle for civil rights, an increased number of Negro lawyers can make a great contribution."[8]

Responding, in part, to these remarks, the Law School established a special faculty committee to develop a program for increasing non-white enrollment. In the Spring of 1968, the faculty voted overwhelmingly to institute a Minority Student Program, with the goal of admitting at least 20 qualified non-white students the following September and as many as 40 per year in succeeding years. The program was described as follows in the Law School Bulletin for 1969-70:

> Rutgers Law School in Newark recognizes a special responsibility to prepare minority group students for the practice of law. In common with the

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[8] 89 N. J. L. J. 801, 807-08 (1966).

rest of the country, the legal system in New Jersey is filled largely with white persons. To assure and build confidence in our legal institutions, it is imperative that blacks enter the legal profession . . . .

• • •

During the last decade, the Rutgers Law School has addressed itself to this problem, cautiously at first, and then, in the spring of 1968 in an extensive way. Facing squarely the fact that reliance by law schools on traditional admissions criteria had had the effect of nearly excluding Negroes from legal education, the faculty of the law school decided to take 20 Negro students as freshmen in the law school, emphasizing age, business experience, leadership potential and personal recommendations. These were carefully considered and evaluated with the Law School Admission Test score and the undergraduate record in constructing the class for the program.

• • •

The program, in operation, has concentrated on making available to the students a combination of increased financial assistance and personal and academic counseling. . . .[7]

Rutgers University and its Board of Governors thus have great interest in and concern about the outcome of this case since it will seriously affect the future of the Rutgers Law School Minority Student Program and the University's ability to serve the educational needs of the state's non-white populations.

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[7] Rutgers University, the State University of New Jersey, School of Law—Newark, Announcement 1969-70, p. 27.

The Student Bar Association (SBA) is the duly elected student government for the Rutgers Law School in Newark. As such it represents a constituency which is about 80 per cent white and some 20 per cent black and Hispanic. The SBA wholeheartedly supports the efforts of the Law School to better serve the non-white populations, and is proud of the Law School's success in dramatically increasing the number of non-white students and graduates in the past few years. The SBA further believes that the entire law school, including its majority white population, have greatly benefited from the increase in minority enrollment and the resulting expansion of "the interplay of ideas and the exchange of views with which the law is concerned." *Sweatt* v. *Painter*, 339 U. S. 629, 634 (1950).

It is absolutely clear from enrollment statistics and applicant credentials that if the law school did not set aside a significant number of spaces for non-white students under the Minority Student Program and if it were compelled to revert to a system of admissions based solely on paper records, the Law School would once again become an almost exclusively white institution, as it was less than 10 years ago.

The student body which the SBA represents thus has both a civic and a personal interest in seeing that the Minority Student Program is not jeopardized by judicial decision.

Statement

It is surely one of the great ironies of American constitutional history that after 350 years of legally enforced and/or sanctioned oppression of black people, the belated

recognition of the right of non-whites to equality before the law is now urged as a bar to the achievement of that very equality.

Yet this case presents just such an anomaly. The Respondent is one of 150 or so law schools in this country which, over a period of many years, either by design or indirection, devised and enforced standards of admission which have resulted in a bar 99 per cent white in a nation whose population is some 20 per cent non-white. Finally and long overdue, the University of Washington School of Law, along with many other law schools throughout the country, abandoned the admission practices which had resulted in a racially exclusive legal profession, and made special efforts to admit and train for the practice of law promising non-white applicants who, while qualified to become lawyers, would have lost out in a strict test of credentials for the limited number of spaces available at the law school.

As such, this admissions program recognized the existence of past discrimination, its adverse effect upon minority participation in our society, and the need for immediate rectification of such injustices; and it endeavored to make constitutional mandate a reality for members of racial minorities. As the President of the University of Washington explained:

> More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or other seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges

> in the University and the University of Washington, in particular, given the racial distribution of this state.
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> • • •
>
> So that was the beginning of a growing awareness that just an open-door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.[8]

The Supreme Court of the State of Washington, reversing its Superior Court, found that this preference given to a reasonably small proportion of qualified minority group applicants did not deny equal protection of the laws to rejected white applicants with superior paper credentials, since the law school was using race to further the state's "undeniably compelling" interest in alleviating "the shortage of minority attorneys—and, consequently, minority prosecutors, judges and public officials—" and "in producing a racially balanced student body." 507 P.2d at 1184.

This Court's decision in this case will affect the futures of similar minority student programs at publicly supported law schools throughout the country.

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[8] *DeFunis* v. *Odegaard*, 507 P. 2d 1169, 1175 (1973).

ARGUMENT

Summary of Argument

Respondents and other Amici will essentially argue that law schools have discretion under the federal Constitution to consider affirmatively race as an element in admission policy to meet the compelling state interest in overcoming the effects of past racial exclusion of blacks and other non-whites from student bodies and alleviating the acute shortage of non-white lawyers which exists throughout the country. We agree with that position amply supported by several of this Court's precedents and will not belabor it. We go further! We argue that there is a *duty* on all publicly supported law schools in the country to take affirmative action to end and counteract the historic pattern of exclusion of non-whites from the legal profession and the legal system.

We believe that duty arises from two separate sources. On the one hand, every one of the nation's "white" law schools bears a personal responsibility for the historic exclusion of non-whites from the legal profession because they have sanctioned and enforced unvalidated admissions standards and devices which have effectively screened out a disproportionate number of qualified non-whites from the law schools, and, consequently, from the bar.

Secondly, the nation's law schools must bear a substantial part of the collective social responsibility for the general exclusion of non-whites from the legal profession and legal institutions as a result of myriad legal, social and educational discriminations over hundreds of years. If these myriad social inequities and injustices have left disproportionate numbers of non-whites ill-equipped to compete in a strict credentials contest, then the law schools must reject strict credentialism in favor of a system which

guarantees admission to a substantial number of otherwise qualified non-white applicants.

Petitioners and their Amici stress that the right of racial equality in this country is strictly an individual and personal right, not a group right.[9] That assertion, whether a correct statement of constitutional doctrine or not,[10] misses the point this Court has emphasized for the past 20 years—the only way to enforce individual rights of racial equality is through remedies that run to the group. Just as the individual right to equal educational opportunity can only be enforced through a unitary school system, and just as the voting rights of each black person require protection of registration rights for all blacks, so the right of each non-white to equality within the legal/political system requires that substantial numbers of otherwise qualified non-whites be admitted to full participation in that system. Like segregated schools, an exclusionary legal system constitutes a badge of inferiority imposed upon all non-whites, deprives each and every member of the excluded group of full participation in the social and political mainstream, and feeds what the New Jersey Select Commission called "the feeling of Negro powerlessness."[11]

Thus, every public institution which controls access to that legal/political system must devise means to effectuate the remedy, just as surely as boards which control voter

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[9] See Petitioners' Opening Brief at 15; Jewish Rights Council Brief at 7; Advocate Society Brief at 9-10.

[10] Amici do not consider it necessary to argue the point in this case. But see Kinoy, "The Constitutional Right of Negro Freedom," 21 Rut. L. Rev. 387 (1967); and Askin, "The Case for Compensatory Treatment," 24 Rut. L. Rev. 65 (1969).

[11] Report for Action, at 162.

registration must devise means to guarantee that all qualified non-whites can register whether or not those boards are in fact responsible for the past exclusion.

In addition, we wish to call to the Court's attention the social consequences of reversal in this case. The Rutgers Law School Minority Student Program, one of the oldest and most extensive in the country, has had significant success in adding non-white lawyers to the American Bar. That success depended upon a system of "preferential" admissions quite similar to that employed by Respondent University of Washington. Should this Court strike down such programs, it will represent an irreparable blow to the cause of full racial equality first set in motion by this Court 20 years ago in *Brown* v. *Board of Education,* and will result in keeping America's racial minorities in a colonial status for the foreseeable future.

I. A Publicly Supported Law School Has an Obligation to Establish Admissions Standards Which Will Assure Entry of a Substantial Number of Qualified Non-White Students in Order to End Their Historic Exclusion From the Legal Profession

Other briefs submitted on behalf of Respondents stress the *discretion* which the Constitution accords to public institutions to consider affirmatively race as an element in admission policy if doing so promotes the state's compelling interests such as guaranteeing an integrated student body and/or alleviating the shortage of non-white lawyers. Amici concur in that position, and note that this Court appears to have already confirmed the "plenary" power of public educational institutions to do so. See *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 16 (1971).

We do not wish to recanvass those arguments here. We go further! We ask this Court to declare not only the discretion but the *duty* of Respondent law school to act as it did to guarantee admission to the school of qualified non-whites. By doing so, the Court will light a beacon signaling to all public institutions their obligation to eliminate official racism from American life, and will ease the presently enormous burden on those institutions which have to date shouldered that obligation voluntarily.

A. The Historic Exclusion of Blacks and Other Minorities From the Legal Profession and Its Consequences

Although formal slavery ceased during the Civil War, the notion of white superiority did not end at Appomatox. As Mr. Justice Douglas, concurring in *Jones* v. *Mayer Co.*, 392 U.S. 409, 455 (1968), said:

> Some badges of slavery remain today. While the institution has been outlawed, it has remained in the minds and hearts of many white men. Cases which have come to this Court depict a spectacle of slavery unwilling to die.

Indeed, inevitably, as in all the cases referred to by Mr. Justice Douglas, it is this seemingly never ending unwillingness that confronts this Court once again.[12] For, of

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[12] The continuing impact of African slavery on the national psyche has been put dramatically and concisely by two black psychiatrists, Grier & Cobbs, in a book *Black Rage* (1968):

> Long ago in the United States basic decisions were made. The most important of these made color the crucial variable. This began as the cornerstone of the system of black slavery. After refinements, it has remained to become embedded in the national character. Persisting to this day is an attitude, shared by black and white alike, that blacks are inferior. This belief permeates every facet of this country and it is the etiological agent from which has developed the national sickness. (25)

course, one of the hallmarks of slavery was the determination to resist efforts to educate the slave. As the pre-*Brown* graduate school cases involving law school admission, e.g., *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents,* 332 U. S. 631 (1948); *Sweatt* v. *Painter,* 339 U. S. 629 (1950), as well as *Brown* and its progeny amply demonstrate, perhaps the greatest resistance to finally eradicating the effects of slavery is on the part of those who would still today deny equal educational opportunities to blacks.

Nowhere has this phenomenon been more evident than in law school admission policies.

Until the 1950's most law schools were completely closed to blacks by law.[13] Even after blacks were held legally entitled to admissions, the majority of law schools admitted few, if any, blacks. Thus, as recently as the 1964-65 academic year, only 701 blacks were enrolled in law schools approved by the American Bar Association,[14] out of a total of 54,265 law students,[15] less than 1.5 per cent.

And, of course, given the historic resistance to educating blacks, law school admission policies were justified—if and when called into question—by the simple assertion that blacks were not "qualified" by the standards of the

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[13] Davis, *Negroes in American Society,* 163 (1949); Leflar, "Legal Education: Desegregation in Law Schools," 43 A.B.A.J. 145 (1957).

[14] O'Neil, "Preferential Admissions: Equalizing Access to Legal Education," 1970 University of Toledo Law Rev. 281, 305. Of this total minority enrollment, 434 were in the 145 predominantly white law schools, an average of 3 blacks per school, while 267 were in the 6 predominantly black law schools.

[15] Ruud, "That Burgeoning Law School Enrollment Slows," 59 A. B. A. J. 150, 151 (Feb. 1973).

white majority. (Neither, of course, was the slave qualified simply to learn to read and write under those standards.)

The figures concerning Chicanos and Indians are even more appalling. In California, for example, which has a Chicano population of more than 2,000,000,[16] only three were graduated from major California law schools in 1969.[17] As of 1969, no American Indian had ever received a law degree from the universities of Arizona, New Mexico, or Utah[18] despite the large Indian population of those states.

These patterns of enrollment in law schools were obviously reflective of the situation in the practice of law itself. The American Bar Association did not open its doors to "welcome blacks into its ranks" until about 1956.[19] Such policies have resulted in a vast shortage of minority group lawyers available to serve their immediate communities particularly when contrasted with the number of white lawyers. Of 324,818 lawyers in the United States in 1971,[20] only 3,845[21] (slightly more than one

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[16] Reynoso, "La Raza, the Law and the Law School," 1970 Toledo Law Rev. 809, 814.

[17] Id. at 816.

[18] O'Neil, *supra*, at 296 n.46.

[19] Levins, "The National Bar Association—Not Just an Option," 53 Judicature 390, 392 (1970).

[20] The 1971 Lawyer Statistical Report, 12.

[21] Toles, The Negro Lawyer in the United States, 112 Cong. Rec. A5458 (1966).

per cent) were black. Yet over 11 per cent of our nation's population is black.[22] Thus while one white lawyer exists for each 631 whites in the population, there is only one black lawyer for each 5,736 black inhabitants of the United States!

The ratios of black lawyers to black citizens in the South are even worse than the national average: Georgia, 1 to 37,500; North Carolina, 1 to 16,000; Louisiana, 1 to 38,500; Alabama, 1 to 40,500, and South Carolina, 1 to 75,400.[23]

Comparisons such as these are similar for other minority groups. In the city and county of Denver, Colorado, for example, about 9 per cent of the population is of Chicano or Spanish-American descent, yet only about 10 of the 2,000 attorneys practicing there in 1967 (one-half of one per cent) had Spanish surnames.[24] At the beginning of 1967, the Bar of California reported a total membership of 29,409 attorneys. By actual count, only 229, that is less than one per cent, had Spanish surnames, making the ratio of Anglo attorneys to Anglo people one in 530, while the ratio of Spanish surnamed attorneys to Spanish surnamed people was one in 9,482.[25]

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[22] U. S. Department of Commerce, Bureau of Census, National Origin and Language, 1 (1973).

[23] Note, "The Legal Needs of Black Owned Businesses in Los Angeles," 20 UCLA L. Rev. 829, 831 n.20 (1973).

[24] University of Denver College of Law, Progress Report to the Ford Foundation: Law School Preparatory Report for College Students of Spanish-American Descent, at 3 (1967) (mimeo.).

[25] Reynoso, *supra*, at 816.

In New Jersey, with a Spanish-speaking population of 300,000, there are an estimated three Puerto Rican lawyers.[26] "The situation appears to be no better in Los Angeles, San Antonio, Spanish Harlem, or in other areas of special need. Legal services are even less readily available to the American Indian and Eskimo community, with only a handful of lawyers belonging to each of the smaller minorities."[27]

The State of Washington is a participant in this system of vast under-representation of minority group members in the legal profession. According to the United States Bureau of Census, in 1970, Washington had only 15 black lawyers[28] out of a black population of 71,308,[29] as compared to 4,974 white lawyers[30] out of a white population of 3,251,055.[31] Thus in Washington there is a ratio of one white lawyer for every 654 white persons, while there is only one back lawyer for every 4,754 black persons.

Judge George Crockett commenting on the effects of black exclusion from the legal profession, said, "As a consequence of a pattern of racism in law enforcement, every American non-white brought into contact with the law was

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[26] Cabranes, "Careers in Law for Minorities: A Puerto Rican's Perspective on Recent Developments in Legal Education," 25 J. Legal Ed. 447, 450-51 (1973).

[27] O'Neil, *supra*, at 296.

[28] United States Dept. of Commerce, Bureau of Census, Characteristics of the Population, Part 49, 489 (1973).

[29] Id. at 41.

[30] Id. at 489.

[31] Id. at 41.

obliged from his first moment of contact with the law to encounter, without exception, white faces at every stage of the most traumatic experience of his life."[82] This is undoubtedly a factor in the finding by the Kerner Commission that

> Some of our courts, moreover, have lost the confidence of the poor. This judgment is underwritten by members and staff of this Commission, who have gone into the courthouses and ghettos of the cities torn by the riots of 1967 . . . .
>
> We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite the fires of disorders.[83]

There are other reasons why it is of immense social and legal importance to have a substantial number of non-white lawyers. As Mr. Justice Brennan has observed, black lawyers "most clearly understand the problems and difficulties found by members of the Negro community."[84] While, of course, many white lawyers have and will continue to give outstanding legal representation to black clients and black interests, these lawyers can never share the experience of living a lifetime in a black skin. Studies recently conducted in the South among the minority population emphasize the need for non-white lawyers:

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[82] Bell, "Racism in American Courts: Cause for Black Disruption or Despair?," 61 Calif. Law Rev. 165, 176, n.38 (1973).

[83] Report of the National Advisory Commission on Civil Disorders, at 183. (Hereafter referred to as National Commission Report).

[84] 89 N. J. L. J. 801, 808.

> A recent survey of several North Carolina counties conducted under the auspices of the American Bar Foundation disclosed not only a critical lack of available legal services, but a feeling by some black residents of the area that white lawyers were simply not accessible to them. Intensive studies of the Negro bar in Southern states confirm this finding; particularly where the case is a controversial one or is potentially divisive along racial lines, white attorneys may be neither able nor willing to take it on even if they are practicing in the area and ready to handle some real problem of the black community. Finally, the white or Anglo lawyer is far less likely than the man who comes from the ghetto or the *barrio* to understand the background of the case, to be able to locate and interview witnesses, to gather material evidence within the community, and so on. Certain tasks can be performed best (and sometimes only) by one who knows the community and its people.
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> The client's ability to communicate freely and fully with the attorney is as vital as the actual availability of an attorney. Clearly, racial or ethnic identity between lawyer and client will enhance or promote such communication. Where the client's basic tongue is Spanish, the advantage of an attorney fluent in that language is plainly apparent. For the black client, the value of a black attorney may be subtler and independent of language barriers, but it may be no less substantial in psychological terms.[88] (Citations omitted.)

The importance of having non-white lawyers is not limited to the benefits that will be gained in eliminating

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[88] O'Neil, *supra*, at 297-98.

racism in the legal system, but extends to every phase of life in society.[36]

Charles V. Hamilton, Professor of Political Science at Columbia University, asserts that one of the major causes of urban violence is that minority groups are, for the most part, not included in the decision making processes involving themselves.

> My idea of a legitimate political system involves the feeling among citizens that they have a personal stake in what is going on. People do not blow up or burn down what they feel they are a legitimate part of.
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> • • •
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> We can concentrate our efforts on programs aimed at how much money we can spend and how fast we can spend it. We can devise public and private ways to build new houses, new schools, and new recreational areas. But if we just donate these things . . ., I am suggesting we will find that those same beneficiaries, who are still excluded, will take those goods and services and still really blow up the cities. And they will do so precisely because they have not really been included in—where the decisions about housing, schools, recreational areas etc., are made.[37]

The Kerner Commission discovered that members of the black community agreed with Professor Hamilton's

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[36] Gordon Allport in his classic study, *The Nature of Prejudice*, 261 (1968) suggests that an increase in the number of black lawyers might have the effect of reducing prejudice against the black community in general.

[37] *Urban Violence*, 48 (Daly, ed. 1968).

"idea of a legitimate political system." The commission found that:

> [G]hetto residents increasingly believe that they are excluded from the decision making process which affects their lives and community. This feeling of exclusion, intensified by the bitter legacy of racial discrimination, has engendered a deep seated hostility toward the institutions of government.[38]

The person most likely to become involved in the decision making or political process in any community is the lawyer.

> By its very nature, the lawyer's profession binds him functionally to his community.
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> • • •
>
> A lawyer is expected to do things not really a part of his practice of law, simply because he is a lawyer.
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> • • •
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> It is evident from this that the Black bar supplied much of the leadership in all phases of the Black community.[39]

When one is talking about "leadership," one is really talking about the three branches of government. Aside from the courtroom, the lawyers' most familiar positions in our society are in the executive and legislative branches of government.

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[38] National Commission Report, *supra*, at 149.

[39] Shuman, "A Black Lawyer's Study," 16 How. L. J. 225, 251-252 (1971).

> No occupational group stands in more regular and intimate relation to American politics than the legal profession. Lawyers make up a large proportion of American politicians at all levels and in all branches of government, in the political parties and in other political organizations. The affinity of law and politics as vocations is a matter of record. In the United States, probably more than any other nation, lawyers are the 'high priests of politics.' . . . That lawyers have an almost complete monopoly of public offices connected with law enforcement and with the administration of law in the courts is not surprising. But they are also prominent as an occupational group in the executive and legislative arenas of government. This has been true from the earliest days of the republic.
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> • • •
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> There is no need to belabor further the fact of the lawyer's ubiquity in politics. It is surely an outstanding phenomenon of American political life.[40]

As might be expected, the shortage of minority members of the legal profession, is reflected in their representation in the halls of government. In the 93rd Congress, of 435 House members, only 15[41] were black, and of 100 Senators, only 1 was black.[42] In the 1971 elections, the

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[40] Eulau & Sprague, *Lawyers in Politics: A Study in Professional Convergence*, 11, 13 (1964).

[41] Congressional Quarterly Almanac, Vol. XXVIII at 1036 (1972).

[42] *Ibid.*

total number of blacks elected to office was 1,860.[43] This represents less than .05% of the total 522,000 elected officials in the nation.[44]

> In the administrative areas of government, in the execution and enforcement of the laws, attorneys likewise enjoy a special position. The ABA has reported that 'ten per cent of American lawyers are employed in government positions' and that 'in the executive branch of government, law training is a recommendation for all kinds of policy-making and administrative-agency positions.' Here again we find gross underrepresentation of Blacks. For example, there are only 69 Black mayors, only 275 Black law enforcement officials (exclusive of policemen), and but a handful of other Black administrators in America today.
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> If the degree of participation, influence, and arguably control exercised by lawyers in all aspects of the governmental system is juxtaposed with the dearth of Black participation and influence in the legal profession, then one significant justification for remedying the problem of 'underrepresentation' may be seen. By increasing the number of Black lawyers, it is at least arguable that a greater degree of Black participation in the governmental processes will result.[45]

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[43] 1972 Information Please Almanac, at 95.

[44] Edwards, "A New Role for the Black Law Graduate—A Reality or an Illusion?," 69 Mich. L. Rev. 1407, 1413 (1971).

[45] *Id.* at 1414.

In the middle 1960's, law schools around the country began to recognize the harmful social consequences of their discriminatory admission policies. Their response was to increase the number of non-white law students by establishing minority students' programs much like that of the University of Washington. The results have been promising; the number of minority students enrolled in law schools in 1973 has risen to 7,601,[46] up more than ten-fold from 701 in 1964.

This figure, which represents nearly twice the number of black lawyers currently practicing, should cause the non-white bar to more than double in the next few years. In spite of these positive signs, however, the number of minority lawyers is still proportionately well below that of their white counterparts.[47]

To curtail these programs at this time would be most unfortunate, since minority Americans have a long way to go before it can be said that they have fair representation in the legal/political system of the United States.

If Black and other minority Americans are going to achieve their rightful place in our society; if they are going to be able to develop their own leadership, so that their representation in the decision-making processes in our society is reflective of their numbers in the population; if they are going to be able to make decisions which

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[46] Association of American Law Schools, 1973, Survey of Minority Group Students in Legal Education (mimeo).

[47] O'Neil, *supra*, at 295, points out that 30,000 more black lawyers are needed to achieve parity with the white population.

fundamentally affect the state of our economy,[48] if they are ever to overcome "the feeling of Negro powerlessness," then the number of minority lawyers in our society will have to increase drastically.

B. Public Law Schools Which (Like the University of Washington) Have Found That the Use of Unvalidated Testing Devices Has Resulted in Denial of Admissions to Non-Whites Have an Obligation to Employ Alternative Criteria in Order to Admit Non-White Students

1. The admissions criteria used in Respondent's Minority Student Program are those traditionally recognized as crucial for the prospective lawyer.

The claim that preferential admissions violate traditional academic standards rests upon an assumption, the fallacy of which should be apparent to anyone who clearly understands the admissions process; that is, admissions decisions derive from simple mathematical projections about the aca-

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[48] "Just as lawyers were critically influential in building the American polity and remain so in guiding it, they were equally influential in shaping the American economy, and they continue to be so. Not accidentally, perhaps, the legal profession grew most conspicuously with the rapid growth of commerce, finance, and industry in the decades around the transition from the nineteenth century to the twentieth. Law was 'one of the careers through which a man could attain influence and wealth even without having capital at the start; and the fortunes accumulated by a few men at the bar were taken as an index of its normal possibilities.' Lawyers not only serve all kinds of economic enterprise in one professional capacity or another, but they also sit as influential members on the boards of banks, railroads, manufacturing concerns, and educational institutions." Eulau & Sprague, *supra*, at 13. (Footnotes omitted).

demic or intellectual ability of applicants. Although there is a grain of truth in this assumption, it seriously oversimplifies what may well be the most complex process in American higher education.[49]

Until recent years, the admissions process at law schools involved a thorough analysis of each applicant, considering academic ability, experience, motivation, interest and personality factors. While admissions committees utilized Grade Point Averages (GPA) and Law School Admissions Test (LSAT) scores, a recent study finds that greater emphasis was placed upon non-numerical data, including appraisals from former teachers, interviews, and indications from the student's file as to employment experience, extra-curricular activities, motivation and interest in law school and maturity.[50] This process reflected criteria that the profession deemed necessary to produce capable lawyers. As the numbers of persons applying to law schools spiraled over the past few years, admissions committees, hampered by time, have been unable thoroughly to evaluate the more important subjective criteria for admissions, and have increasingly come to rely upon numerical data, utilizing the GPA and LSAT—arriving at a magic combination of the two known as PFYA, Predicted First Year Average. Thus, the traditionally recognized criteria became of secondary concern, and are often abandoned altogether when the numbers of applicants become unmanageable for admissions committees. As recently stated in the American Bar Association Journal:

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[49] O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," 80 Yale L. J. 699, 701 (1971).

[50] Stephenson, "Why Law Schools Shouldn't Play the Numbers," 59 A. B. A. J. 492 (1973).

> The legal profession certainly does not discount intellectual promise and academic accomplishments but it traditionally has placed much emphasis on qualities of character and maturity, self-discipline, leadership, and personality attributes. These apparently no longer matter at law schools that employ a version of slide-rule admissions, where the regeneration of the legal profession has been reduced to a combination of two figures of three digits each.[51]

Concern of test developers has grown as schools placed greater reliance upon standardized tests that were not designed to be the crucial factor in admissions, but merely one index of indicated first year law school performance.[52] As stated by Peter Winograd, director of law programs at Educational Testing Service (ETS):

> There are many in our professions, on our faculties, indeed on our admissions committees, who, perhaps being misled by the precision with which LSAT scores are reported, tend to give the test more weight than it can reasonably bear.[53]

The ETS Handbook for Law School Deans and Admissions Officers states ". . . predictions based on LSAT scores and undergraduate grades is far from perfect. There will be a great number of cases where prediction misses the mark by a moderate amount and a sizeable number

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[51] *Id.* at 494.

[52] Educational Testing Service, Operations Reference Book, Law School Admissions Service § 2.

[53] Winograd, "Law School Admissions: A Different View," 59 A. B. A. J. 862 (1973).

where actual performance will be directly opposite from predicted performance."

ETS recognizes that these problems are magnified in interpreting minority student performance on the LSAT.

> Scores on the LSAT as on other tests, never completely represent the potential of any student. This is especially true for American Indian, Black, Mexican-American and Puerto Rican students whose educational experience, in and out of school, has differed significantly from that of the great majority of students. However, it should be borne in mind that tests such as the LSAT are best conceived of as measures of developed abilities—that is, they reflect the product of cumulative educational experience over a long period of educational growth and development. For the most part, the traditions and experience of American Indians, Blacks, Mexican-Americans, and Puerto Ricans have not been influential components of this cumulative education. In effect, the LSAT can be utilized to indicate the extent of educational damage resulting from unequal educational opportunity as well as for a basis of comparison with other candidates in terms of the elements represented in the tests.[54]

The University of Washington, as well as other law schools which have minority admissions committees, has recognized the limitations of such tests. It has returned to more subjective criteria, traditionally valued as crucial, and away from mere numerical indicators to gauge the academic potential of minority applicants. As explained in the opinion of the Supreme Court of Washington:

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[54] Educational Testing Service, Operations Reference Book, *supra*, § 2, p. 5c.

> All files of minority applicants were considered by the full committee as warranting their attention regardless of the PFYA of the individual applicant . . . In reviewing the files of minority applicants, the committee attached less weight to the PFYA in making a total judgmental evaluation as to the relative ability of the particular applicant to succeed in law school.[55]

This committee considered other indices of intellectual ability and academic promise and concentrated on indicators of character, motivation, maturity, and self-discipline, leadership and personality. Thus, the "different standards" in evaluating white and non-white applicants, is *not* a reflection of lower standards for minority groups, but a reflection of the fact that minority admissions looks to the traditionally important criteria which have been all but abandoned for non-minority students.

The major misinterpretation of this separate selection process is that minority students are "unqualified" for law school. Such opinions reflect confusion about the term "qualified" even accepting, *arguendo,* the validity of numerical tests.

> When the applicant population exceeds the size of an entering class by a factor of 10 or more—a finer screen is necessary . . . the result is that many thousands of applicants qualified in the absolute sense, are nevertheless not 'qualified for admissions.' Law School minority programs typically select minority candidates from among this group of qualified applicants. That such applicants might not be admitted if strict numerical standards were applied cannot justify saying they are unqualified for law study.[56]

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[55] 507 P. 2d at 1174-75.

[56] Winograd, *supra,* at 101.

The University of Washington's regular admissions policy, while considering non-numerical factors to some extent, is essentially a "numbers game"; its minority admissions program is not. It places less reliance upon numerical standards and examines subjective criteria more fully than is possible in an overburdened regular admissions process. Thus, the criteria used for minority admissions reflect a comprehensive review of requisite attributes for qualified students, those criteria traditionally recognized as crucial to training capable lawyers.

2. *It is proper for law schools to mitigate reliance on the Law School Admissions Test in admitting nonwhite students since its validity as a predictor of success in the legal profession has not been demonstrated.*

Admission to law school cannot be viewed in isolation; it is, in its broader context, the first stage of admission into the legal profession. One cannot become a lawyer, with rare exceptions, without attending an accredited law school. Thus, any selection device for admission to law school, in effect, selects future members of the profession, just as apprenticeship criteria determine future craftsmen.

The Law School Admissions Test was only intended to supplement the undergraduate record and other information about the student in the assessment of his/her competence for law school work,[57] and was designed only to predict first year law school grades.[58] Yet because of the administrative burdens posed by the deluge of applicants in

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[57] Educational Testing Service, Operations Reference Book, *supra*, § 2, p. 1.

[58] Educational Testing Service, LSAT Validation Study Service for Rutgers University, at 2 (1969).

recent years, it has become a convenient crutch for fast decision and probably the major determinant of admission to the majority of American law schools. Given this increasing reliance upon the LSAT as a factor in admissions decisions, the necessary conclusion is that the LSAT constitutes a prerequisite for employment in the legal profession.

In view of this, it is necessary to examine the LSAT against the standards that the courts and the federal government have established to judge whether employment tests are discriminatory. According to the Department of Labor ". . . evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job(s) for which candidates are being evaluated . . . under no circumstances will the general reputation of a test, its author or publisher, or casual reports of test utility be accepted in lieu of evidence of validity."[89]

In *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court held that employers cannot require a high school diploma or a passing score on a standardized test when (a) these criteria are not reasonably related to the job to be performed, and (b) their application excludes a significantly higher proportion of blacks than whites.

> If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[90]

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[89] U. S. Dept. of Labor, Validation of Employment Tests by Contractors and Subcontractors: Subject to Provisions of Executive Order 11246 (1968) 2-6.

[90] 401 U. S. at 431.

While the *Griggs* requirement results from a statutory rather than constitutional mandate, it has been held that the "Fourteenth Amendment imposes upon [public] defendants prohibitions against race discrimination that are at least as great as those levied upon private employers [under Title VII]." *Baker* v. *Columbus Municipal School District*, 329 F. Supp 706, 721 (N. D. Miss. 1971). Title VII standards, as interpreted in *Griggs*, have been extended beyond private employment to public employment, jury selection and school desegregation cases. *Chance* v. *Bd. Examiners*, 458 F. 2d 1167 (2d Cir. 1972), *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972), *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351 (N. D. Calif. 1972), *Carmical* v. *Craven*, 457 F. 2d 582 (9th Cir. 1971). In *P.* v. *Riles*, 343 F. Supp. 1306 (N. D. Calif. 1972), challenging the use of I.Q. tests as a determinant in placing black students in educable mentally retarded classes, plaintiffs relied upon the Title VII conceptual scheme as developed in *Griggs*. The Court held that ". . . this same [*Griggs*] approach should be utilized in analyzing plaintiff's contention that the use of the I.Q. tests to determine placement in EMR classes violates their right to equal protection of the laws. There are several reasons why the burden is shifted in employment discrimination cases; and all of them dictate that the same process be followed in the instant case." 343 F. Supp. at 1309. In *Baker* v. *Columbus Municipal School District*, *supra*, it was held that these standards should be applicable to the National Teachers' Examination. Similarly, the LSAT, challenged on equal protection grounds, should be subject to as strict scrutiny under the 14th Amendment as it would be under Title VII.

Applying these standards, it is indisputable that the LSAT has had the effect of excluding a higher proportion of blacks than whites from the nation's law schools

and the legal profession.[61] (See Part I A, *supra*). And as this Court said in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 805 n. 19 (1973), statistics of racial composition may "itself [be] reflective of restrictive or exclusionary practices."[62]

Moreover, the LSAT has not been validated as a criterion reasonably related to legal job performance. There have been no studies completed consisting of empirical data where the "important elements of performance in the legal profession" have been established. Standards for success in the profession have not even been delineated and tested. Nor is it possible to state that predicting performance of first year law students serves to predict their future performance in the legal profession.

A 1968 study of law students taking the California bar exam indicated that the LSAT is not an accurate predictor of performance on the bar nor is it a good predictor of total law school grades. Findings indicated that Total Law School Grades was the most accurate predictor of performance on the bar.[63]

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[61] 1967 AALS Minority Group Study, at 166, reports that scores for black students averaged about 165 points below the median. The historical effects of the LSAT is partially evident in the fact that 12 per cent of the population is black while only 1 per cent of the bar is black. Gelhorn, "The Law School and the Negro," 1968 Duke Law Journal 1069, 1073. In some part, this is due to relatively small numbers of minority applicants, however test scores account for a major part of the result.

[62] See also Blumrosen, "Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination," 71 Mich. L. Rev. 59, 91-94 (1972).

[63] Richard W. Watkins, The Comparability of Grades on the California State Bar obtained at Different Admissions, Educational Testing Service, SR 68-1-WO (March 1968). The correlation between performance on the LSAT and the bar was .19, meaning that 19 times out of 100 the LSAT was an accurate predictor of bar exam performance, hardly an accurate barometer. Correlation between the LSAT and Total Law School Grades was .33, barely statistically significant. The highest correlation was Total Law School Grades with bar examination performance, .69.

Studies have recently been undertaken by ETS sponsored by the Law School Admission Council, American Bar Foundation, Association of American Law Schools and the National Conference of Bar Examiners to examine the LSAT in light of performance throughout law school and performance on the bar on a national basis. However, such studies will not be completed for two years. ETS eventually hopes to undertake a study to establish criteria for evaluating success as a lawyer.[64] Until the completion of these studies, the unvalidated LSAT exam is being utilized way beyond its purpose; it effectively selects lawyers when it is designed only to select first year students.

Even if prediction of success as a first year law student is an acceptable criterion for a test used to select future lawyers, the LSAT has not been validated for minority students and would, therefore, not meet EEOC guidelines.[65] In 1964, the Law School Admission Council authorized the first extensive study of the interpretation of scores for "culturally deprived" students. While the data proved inconclusive as to the first issue, preliminary studies indicated that the median score for black students was about 165 points lower that the LSAT's historical median.[66]

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[64] Alfred Carlson, Charles Werts, Proposal: Relationships Among Law School Predictors, Law School Performance, and Bar Examination Results, Educational Testing Service (February 1973).

[65] Executive Order 11246 states ". . . only a test which has been validated for minorities can be assumed to be free of inadvertent bias."

[66] 1967 Association of American Law Schools Minority Group Study, 166.

From this, one could conclude either that there is an inherent flaw in the black students or an inherent flaw in the LSAT. In fact, it is the latter conclusion that a further preliminary study done by ETS reached. The study, testing "culturally different" students against their dominant culture counterparts, reached only one conclusion of statistical significance: the LSAT is not a good predictor for the culturally different."[67]

Recently, ETS has undertaken a study: "Predicting Law School Grades for Blacks," that will not be completed for two years. The preliminary report suggests, however, that the admissions test is as accurate (or inaccurate) a predictor of law school success for "culturally deprived" as for more fortunate students. However, as the dean of a black law school has observed:

> Is it any wonder that . . . culturally deprived and disadvantaged people are not capable of demonstrating qualifications to study law when their ability is measured by methods and criteria designed to test a group from which they have been effectively excluded both culturally and educationally . . . None of the . . . justifications for the present method of determining qualifications to study law are applicable to Negro youth. He has not been sufficiently exposed to cultural advantages and educational materials which tend to develop innate abilities . . . This being true, many Negro youth may be excluded from the study of law, not because they lack ability, but rather because inappropriate means of determining their ability have been and are being employed.[68]

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[67] Charles T. Consalus, Program Director, LSAT, The Law School Aptitude Test and the Minority Student, 513.

[68] Carl and Callahan, "Negroes and the Law," 17 J. Legal Ed. 250, 257-58 (1965).

The legal profession is concerned with developing criteria that are validly related to performance as a lawyer. Such research is necessarily a lengthy process. During that process reliance upon a standard which not only questionably meets its *stated* purpose—prediction of first year success—but results in far exceeding that purpose—selection of lawyers—is questionable at best. This is especially crucial when the effect of the LSAT as a law school selection device is the exclusion of a class of persons from the legal profession.

Employers utilizing tests that have not been validated are required to suspend use of the test until validation studies are completed.[69] It is equally as important that professional schools, mandatory links in the path toward employment, adopt similar standards. It was not only permissible, but essential that the University of Washington suspend the use of the LSAT for minorities in admission to the profession.

C. The University of Washington Law School Had an Affirmative Duty to Remedy the Effects of Past Discrimination

1. The source and nature of the duty.

Until the University of Washington Law School began implementation of its minority student program, it had—as had other American institutions of higher learning, including Rutgers University—shared in the exclusion of non-whites as a class from access to equal educational opportunities. Particularly, given its mission of training students for the practice of law, it had shared in the ex-

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[69] *Griggs* v. *Duke Power Co., supra.*

clusion of blacks as a class from the opportunity to be educated for the legal profession (See Part 1A, *supra*). We have described that exclusion, which continued well into this century, as an extension of the historic prohibition against educational training for blacks begun during the period of African slavery in this country.

With respect to this denial, as is true of black opportunity in all phases of American life—voting, jury service, access to public facilities, employment, housing, recreation, etc.—two things may be fairly said. First, that it was precisely the purpose of the Reconstruction Amendments and subsequently enacted civil rights legislation to end not only the denial of these opportunities but their continuing consequences as well. The cases in this Court making this point are, of course, legion. *Brown* v. *Board of Education*, 347 U. S. 483 (1954); *Louisiana* v. *United States*, 380 U. S. 145 (1965); *Carter* v. *Jury Commission of Greene County*, 396 U. S. 320 (1970); *Jones* v. *Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park*, 396 U. S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreation Assoc.*, 412 U. S. 431 (1973), are ready, recent examples. Second, given the purpose of these Amendments and laws, all public institutions responsible for the historic and continuing denial of black opportunity have an affirmative duty to act in such a way as to overcome the effects of past discrimination as a means of assuring meaningful present opportunities for black Americans. See, e.g., *Swann* v. *Charlotte-Mecklenburg Board of Education*, 401 U. S. 1 (1971); *Gaston County* v. *United States*, 395 U. S. 285 (1969); *Louisiana* v. *United States*, *supra*. And we can think of no public (or indeed private) institution in the United States that is not properly chargeable with contributing to the exclusion on racial grounds of blacks *as a class* from opportunity in all sectors of American life.

Surely, the officials of the University of Washington Law School, as well as officials of this institution, have acknowledged by their actions the pervasiveness of institutional racism throughout the society and their responsibility for seizing the options available to them in combatting it. Just as courts, when required by the commands of the Reconstruction Amendments and specific pieces of legislation enforcing them, have "not merely the power but the duty to render [decrees] which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future," *Louisiana* v. *United States, supra,* 380 U. S. at 154, so all other public institutions are required, "so far as possible" to extirpate what this Court, as long ago as the *Civil Rights Cases,* 109 U. S. 3 (1883), and as recently as *Jones* v. *Mayer Co., supra,* has called "the badges and incidents of slavery."[70]

This is certainly not a novel proposition. State election officials, *Louisiana* v. *United States, supra,* those who conduct the machinery for selecting juries for state courts, *Alexander* v. *Louisiana,* 405 U. S. 625, 632;[71] *Carter* v. *Jury Commission of Greene County,* 396 U. S. 320 (1970); *Turner* v. *Fouche,* 396 U. S. 346 (1970), as well as public school officials, *Swann, supra,* and officials of public institutions for higher learning, *Norris* v. *State Council of Higher Education for Virginia,* 327 F. Supp. 1368 (E. D. Va. 1971—three judge ct.) aff'd *sub nom. Board of Vis-*

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[70] See generally, Kinoy, "The Constitutional Right of Negro Freedom," 21 Rut. L. R. 387 (1967).

[71] "The [jury] commissioners, in any event, had a duty 'not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds *Hill* v. *Texas,* 316 U. S. 400, 404 (1942).'"

itors of the College of William and Mary i.: Virginia v. *Norris*, 404 U. S. 907 (1971), have this duty. As the *Norris* court said, 327 F. Supp. at 1373:

> The means of eliminating discrimination in public schools necessarily differ from its elimination in colleges but the state's duty is as exacting.

Thus the duty is not different merely because attendance below college is compelled, while students have to apply for college and law school.

Nor is the duty to remedy past wrongs limited to the agencies or officials directly responsible therefor. This Court has indicated, quite properly, where the issue has been presented, that all public agencies have the responsibility to conduct themselves in a manner that does not perpetuate the effects of past racial discrimination. For example, in *Gaston County* v. *United States*, 395 U. S. 285 (1969), this Court held that the defendant board of elections had a duty to follow a system of voter registration which did not impose additional burdens on blacks because they had been denied equal educational opportunity by school administrators over a period of many years. Pursuing that theme in its unanimous opinion in *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971), this Court defined that duty as the "removal of artificial, arbitrary and unnecessary barriers . . . when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U. S. 424, 431 (1971). The *Gaston County* and *Griggs* cases once more recognize the illogic of asserting that the "indiscriminate imposition of inequalities," *Shelley* v. *Kraemer*, 334 U. S. 1, 22 (1948), can add up to equal treatment. It was recognition of this obvious and elementary proposition that properly led the Respondent law school to accept its duty

to provide a remedy for members of the groups which had so long been excluded from the law schools and the legal profession by a variety of discriminatory societal practices.

And as the officials to whom the judgment of whether law school applicants are qualified for admission has been committed, they are entitled to have that judgment sustained not simply because what they did was right, but because they did what they were required to do. Cf. *Porcelli* v. *Titus*, 302 F. Supp. 726 (D. N. J. 1969), aff'd., 431 F. 2d 1254 (3rd Cir. 1970), cert. denied 402 U. S. 944 (1971); and *Contractors Assoc. of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971). Respondents were not entitled to remain indifferent to the many years during which no blacks were found "qualified" for entrance; indeed they were required to turn away from precisely the kind of neutral or "even-handed" application of admission standards that, if continued, would have perpetuated the long-standing discrimination. Against the claim of obligation to be "neutral" are arrayed the claims of years of past educational discrimination. In such circumstances, the commands of the Constitution must prevail. *Gaston County* v. *United States*, *supra*.

2. Proper discharge of the duty requires remedial action with respect to the affected group not merely with respect to individuals.

Petitioners and some of their Amici insist that the Fourteenth Amendment provides rights only for individuals, not for groups. This misses the point of 20 years of racial discrimination decisions by this Court. Individual discrimination on racial grounds occurs precisely because of iden-

tification of the victim as a member of a class of persons historically treated as separate and apart. *Brown* v. *Board of Education*, 347 U. S. 483 (1954), the fountainhead decision, was a class action. All the cases trailing in its wake have emphasized the need for a remedy for discrimination running to the group. For only by dealing with the effects of class/racial antagonism can individual freedom be secured. In this country, black people were enslaved as a group, Jim Crowed as a group and segregated as a group. For that reason they can only be liberated as a group, and this is the clear meaning of this Court's decisions for at least two decades.[72]

Despite Petitioners' objections, Respondents were absolutely right in determining that their duty to mitigate the effects of past exclusion of non-whites from the law school required a remedial program in which all members of the excluded class were entitled to participate, not merely those who could demonstrate that they were targets of specific discriminatory treatment.[73]

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[72] See Askin, "The Case for Compensatory Treatment," 24 Rutgers L. Rev. 65 (1969).

[73] The brief of the Anti-Defamation League suggests that black people, following the views of Sir Henry Maine, should eschew group remedies and "move toward freedom by the rejection of status, measured by immutable factors like race, for assigning an individual his place in our society." (p. 22). To people who spent 250 years in slavery and the next 90 as the victims of segregation and Jim Crow legislation, this suggestion is too cruel to be humorous.

II. This Court Should Not Strike Down Programs Which Have Demonstrated That They Can "Work Now" to Help End the Historic Exclusion of Racial Minorities From the Legal Profession

A. The Rutgers Minority Student Program Convincingly Demonstrates That Special Admissions Programs Such as That Instituted by Respondent Can Bring Many More Qualified Non-Whites Into the Legal Profession and Help End Their Historic Exclusion From It

In the eight graduating classes from 1960 to 1967, Rutgers Law School in Newark graduated a total of 12 non-white students, an average of 1.5 per year.[74] But even some of this handful of blacks would not have been admitted if the school had adhered to a strict policy of color-blindness. For the Rutgers Law School admissions office, from at least the beginning of the decade, had been sensitive to the racial exclusivity of the school and sought out, among the applications it processed, promising non-white students whose paper records alone were insufficient to guarantee admission in a strict credentials competition.

In 1968, there were fewer than 100 black lawyers among the 8,000 members of the New Jersey bar.[75] Finally, in the spring of 1968, the Law School faculty, responding to what it perceived to be compelling and overwhelming social needs and a legal obligation to eliminate the fruits of white racism from its admission policies, voted overwhelmingly to establish a Minority Student Program. Motivat-

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[74] The law school graduated approximately a thousand students during that period.

[75] See Blumrosen, "Legal Education for Black Students: A Remedy for Class Discrimination," 1970 Univ. of Tol. L. Rev. 799, 803.

ing the faculty action was not only its own recognition of the gross underrepresentation of non-whites in the student body and at the Bar, but also the general political and social unrest that existed in the non-white communities of Newark, as in other urban centers, resulting from a "feeling of . . . powerlessness" on the part of the non-white populations. See Report of New Jersey Governor's Select Commission on Civil Disorders, 162.[76] Cf. *Porcelli* v. *Titus*, 108 N. J. Super. 301, 261 A. 2d 364, 369 (App. Div. 1969), noting the social crisis caused by the dissatisfaction of the black community in Newark with its conditions of life.

The faculty was in agreement with the comments of Mr. Justice Brennan delivered at the law school's dedication ceremonies a year earlier that "the effort to provide equal rights and opportunities for Negro citizens . . . can best be met by a Bar which includes Negro lawyers in significant numbers, for it is those lawyers who most clearly understand the problems and difficulties faced by members of the Negro community."[77]

Emphasizing the faculty's legal *duty* to take affirmative action in the area of admissions was a feeling that past policies, in common with other law schools, had been racially discriminatory. This view was articulated by one faculty member, a former Chief of Conciliation for the United States Equal Employment Opportunity Commission, as follows:

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[76] This same finding was made by the counterpart National Advisory Commission on Civil Disorders, at 149:

> [G]hetto residents increasingly believe that they are excluded from the decision-making process which affects their lives and community. This feeling of exclusion, intensified by the bitter legacy of racial discrimination, has engendered a deep seated hostility toward the institutions of government.

[77] 89 N. J. L. J. 801, 808.

> The institutions of legal education have practiced a form of race discrimination by excluding blacks and other minority group persons from admission to law schools and hence from the practice of law. Mechanisms by which this exclusion has been accomplished involve recruitment and admission practices of the nation's law schools. Recruitment practices have included family preferences, reliance on references from within the profession, word of mouth encouragement and other actions which have effectively confined motive and opportunity to secure a legal education to white students. Admission practices have included devaluation of grades from 'inferior' colleges heavily attended by minorities, and reliance on the Law School Admission Test. Both of these factors measured the black student's potential for the practice of law against his possible ability to serve the white community, and both ignored the needs of the black community for legal services which included actions by representatives of minority racial and ethnic backgrounds. Even the correlation of college grades and LSAT scores with success in the practice among whites is not so clear as to preclude questioning these standards as the basis for admission practices. When the use of these standards produces segregated legal education, the doubt concerning their validity becomes an insistent question. The validity of these standards as measuring the ability to provide legal services to the minority community has not been established.[78]

The faculty thus set a goal of admitting 20 qualified minority students in the fall of 1968, to be increased to 40

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[78] Blumrosen, *supra* at 800-801.

in succeeding years. A special committee was established to recruit qualified non-white students, plan and execute the program, locate scholarship assistance and develop a program of remediation to help those students specially selected adjust to the first year of legal studies.

In evaluating applicants for admission under this Minority Students Program, the Committee placed little reliance on LSAT scores, but focused on undergraduate performance, including extracurricular activities, personal evaluations of former teachers and prior experience in business and/or civic activity indicating leadership potential.[79] The Minority Student Program Committee was instructed that if there was any question about locating qualified students to achieve the goals established, any student who had graduated from an accredited college or university in the top half of his/her class was to be considered presumptively qualified for admission. The goals established for admission under the Minority Student Program were separate from any non-white students who were admitted under the regular admissions process. However, it should be noted that in the six years of the Minority Student Program no more than six non-white stu-

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[79] It is suggested by one of Petitioners' Amici that they would find it permissible for a law school to apply such subjective evaluative standards and procedures across the board to all applicants, but not to minority applicants alone. (See Brief of American Jewish Congress at 7-8.) It is obvious that Amicus has never been an admissions officer at a major law school or other academic institution. Rutgers Law School, Newark, e.g., processes nearly 5,000 applications a year. Such personal evaluation of all applicants would require a many-fold expansion of its admissions staff, the cost of which would be prohibitive. It is a significant burden to do this even for the 600-odd minority applicants the school now processes each year, but not unmanageable in relation to its purpose.

dents[80] have actually entered the Law School apart from the special program.[81]

Of the 20 students found qualified for law study and with a potential as lawyers who entered the law school during the first year of the special program,[82] none would have been admitted but for the Minority Student Program. For example, only four of those 20 had LSAT scores above 500, while among the regularly admitted freshmen that year, very few had LSAT scores below 500.[83] Of these 20 students, 16 graduated with their entering class at the end of three years; two were delayed by scholastic difficulties but were graduated after four years; one left for academic reasons; and one withdrew for military service. Of the 16 graduates of this class of 1971, all are now members of the Bar in at least one state, except for one who returned to his native Nigeria as a representative of an American corporation.

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[80] Since the records of students admitted under the Minority Student Program are not separately maintained, these figures are not subject to exact verification.

[81] It is believed that some non-white students who were regularly admitted to the law school during that period chose instead to go to other—possibly more prestigious—law schools, some as a result of minority student programs operating at those institutions.

[82] It was coincidental that the school precisely met its goal of 20 in the first year. In most years since, the number of students entering under the minority program has fallen short of the goal.

[83] For the regularly admitted students in 1968, LSAT scores in the range of 500 could only be offset by a near perfect undergraduate average. The median LSAT score for regularly admitted students at Rutgers Law School, Newark, in 1968 was 583, and the median grade point average was 2.94.

All told, from the fall of 1968 to the present first year class, approximately 235 students have been admitted to the law school as a result of the Minority Student Program. Of the 92 students admitted during the first three years of the program, 66, or 71.7 per cent, have been graduated.[84] Approximately ten dropped out or were dismissed without readmission for academic reasons.[85]

Of these 66 graduates in the first three years of the program, law school records indicate that at least 44 have been admitted to bars in at least one state.[86] An additional three minority students who were permitted to transfer to Rutgers from other law schools were graduated during these three years. This overall total of 69 students who were graduated from the law school as a result of the Minority Student Program during the three-year span contrasts with the eight non-white students graduated by the law school in the preceding eight years.

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[84] Graduating classes of 1971, 1972, 1973.

[85] The remaining students unaccounted for in these figures have either transferred in good standing to other schools or have fallen behind their classmates. Of the latter group, many are yet expected to successfully complete law school. One died prior to graduation.

As noted earlier, separate records of students admitted under the Minority Student Program have not been maintained by the law school. However, the figures cited herein have been reconstructed by members of the Dean's Office at the law school and are essentially accurate.

[86] New Jersey, 37; New York, 2; Mississippi, 2; Connecticut, 1; Maryland, 1; North Carolina, 1; Tennessee, 1; Virginia, 1. Two students have been admitted to the bars of two states. The law school has lost contact with some of the graduates and does not know their bar status.

These 69 students, who would not have been admitted/or graduated from Rutgers Law School, Newark, had they not been eligible for admission under the Minority Student Program, have since launched their legal careers as follows:[87]

OEO Legal Services (includes 9 Reginald Heber Smith Fellows)	13
State or Municipal Government (includes 4 with Attorney General of N. J.)	11
Private law firms (2 in New Jersey; 2 in New York; 1 in Florida and 1 in Texas)	6
Federal Government (3 with EEOC; 1 with FTC; 1 with NLRB; 1 with U. S. Bureau of Prisons; 1 with Justice Department)	7
Public Defender	6
Private Voluntary Agencies	6
Judicial Clerkships (Includes one with Supreme Court of Connecticut and one with Supreme Court of Hawaii)	5
Private Corporations	4
Private Practice	3
Staff of elected public officials	2
Judicial administration	2
Graduate school	2

[87] Where a graduate has held more than one job since graduation, only the more significant is noted.

Legal education	1
Military service	1[88]

During the first five years of the program, only 17 per cent[89] of those admitted under the Minority Student Program failed to meet the school's academic requirements and were dismissed from school, at least temporarily, for poor academic standing.[90] The vast majority of the specially admitted students demonstrated that they had the capabilities of successfully completing the study of law.

B. The Consequences of Reversal in This Case Would Be to Strike Down Programs Which Have Demonstrated They Can "Work Now" to End Racial Exclusion in the Legal Profession and Would Be a Severe Setback to the Cause of Racial Equality in the United States

In the same year that the faculty of the Rutgers Law School in Newark instituted its Minority Student Program, this Court declared, in a unanimous opinion, that the duty on a public educational institution with a history of racial exclusivity was "to come forward with a plan that promises realistically to work, and promises realistically to work *now*." *Green* v. *County School Board of New Kent County,* 391 U. S. 430, 439 (1968).

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[88] Considered as a representative sample of any group of law graduates from any institution, the range of legal occupations is fairly typical.

[89] 28 out of 186. This does not include the present first year class.

[90] Until the current year, a student who got a grade of Unsatisfactory in three or more courses during two consecutive semesters was dismissed from school. The student might then be reinstated only by appeal to the faculty's Scholastic Standing Committee.

A number of public law schools across the country, including Rutgers and Respondent University of Washington, attempted to carry out that mandate by the establishment of special programs for admission of qualified minority group students into what had been essentially all-white institutions in the past. If ever a plan has worked to end racial exclusion, it is the Rutgers Minority Student Program, as the figures cited *supra* show. While the record before the court is silent as to the success of the somewhat more modest Washington Law School program under challenge here, there is no reason to believe that, permitted to flourish, it will not make its own contribution to ending the image and reality of the law as a profession for whites. It must be given that opportunity if we are to have any chance of reversing the movement of our nation "toward two societies, one black, one white —separate and unequal."[91] As the National Advisory Commission on Civil Disorders warned us, that drift "threaten[s] the future of every American." Programs such as those established by the law schools at Rutgers and the University of Washington show promise of dissolving that threat and making our future as a multiracial nation possible.

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[91] National Commission Report, at 1.

CONCLUSION

For the reasons set out above, as well as those stated by Respondents and the other amici supporting their position, the decision of the Court below should be affirmed.

Respectfully submitted,

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